

STATE OF MICHIGAN
COURT OF APPEALS

SARAH POTTER,

Plaintiff-Appellee,

v

F. PATRICK DEVINE, Personal Representative of
the Estate of ARTHUR CARL DAVIS,

Defendant-Appellant,

and

TITAN INSURANCE COMPANY,

Defendant.

UNPUBLISHED

June 20, 2013

No. 308878

Oakland Circuit Court

LC No. 2011-119383-NI

Before: WHITBECK, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant, F. Patrick Devine, personal representative of the estate of Arthur Carl Davis, appeals by leave granted the trial court's order denying his motion for summary disposition pursuant to MCR 2.116(C)(7). Because the trial court erred by concluding that plaintiff properly served Davis with the summons and complaint, and plaintiff failed to serve Devine with a proper summons and complaint before the statute of limitations expired, we reverse and remand for entry of summary disposition in Devine's favor.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This action arises out of a June 8, 2008, motor vehicle accident involving plaintiff and Davis. In her complaint filed on May 27, 2011, plaintiff alleged that Davis failed to yield while executing a turn and negligently caused plaintiff to strike his vehicle.¹ Plaintiff, through a process server, attempted to personally serve Davis with the summons and complaint on five

¹ Plaintiff also alleged a claim for uninsured/underinsured motorist benefits against defendant Titan Insurance Company, her insurance carrier. The parties stipulated to the dismissal of that claim, which is not at issue in this appeal.

separate occasions in August 2011. In an affidavit, the process server averred that on those five occasions he attempted service at Davis's home in a gated community. According to the process server, he identified himself to the security guard, who called Davis to ask permission for the process server to enter the community, which was refused. The process server concluded that Davis was evading service.

On August 24, 2011, plaintiff filed a motion for alternate service and a second summons, which the trial court granted. On August 26, 2011, the trial court entered an order directing plaintiff to serve Davis by regular or certified mail and by publication in the Oakland County Legal News. The second summons expired on October 10, 2011.

Plaintiff published notice as directed in the trial court's order. Plaintiff also attempted to serve Davis by certified mail, but the envelope was returned on or about August 30, 2011, marked: "RETURN TO SENDER[;] DECEASED[;] UNABLE TO FORWARD." In fact, Davis had passed away on December 13, 2010.

On August 24, 2011, plaintiff sent a copy of the summons and complaint by certified mail to Virginia Davis, Davis's widow, asking her to forward the documents to the insurance company that insured Davis's vehicle at the time of the accident. On October 7, 2011, plaintiff sent a copy of the summons and complaint to both the resident agent and the third-party adjuster for Farm Bureau Insurance Company (Farm Bureau), Davis's insurer at the time of the accident. On October 10, 2011, the day that the second summons expired, plaintiff filed a petition for the appointment of a personal representative of Davis's estate in the Oakland County Probate Court. On November 2, 2011, the probate court appointed Devine as the personal representative of Davis's estate, and, on November 8, 2011, plaintiff sent Devine a copy of the complaint. On November 30, 2011, plaintiff filed a motion for an order substituting Devine, as personal representative of Davis's estate, in place of Davis in this action. The trial court granted the motion.

Thereafter, Devine filed a motion for summary disposition pursuant to MCR 2.116(C)(7) arguing that the statute of limitations expired on October 10, 2011, the date that the second summons expired. Devine asserted that plaintiff's complaint was time-barred because she did not serve Davis's estate until November 8, 2011, and the complaint named Davis as a defendant rather than Devine. Devine argued that the statute of limitations was not tolled pursuant to MCL 600.5856(a) because plaintiff did not serve a copy of the summons and complaint on Davis's estate within the time set forth in the Michigan Court Rules.

In response, plaintiff argued that she properly served Davis in accordance with the trial court's order for alternate service when she served him by certified mail and publication in the Oakland County Legal News. Plaintiff asserted that the estate did not exist at the time that she filed and served the complaint and that Davis was the proper defendant until the trial court granted plaintiff's motion for substitution of parties. Therefore, plaintiff argued, Davis was the proper defendant during the period of the second summons, and plaintiff served him before it expired. In addition, plaintiff argued that Michigan law allows a party to serve an insurance carrier when a defendant cannot be located, and plaintiff served Farm Bureau, Davis's insurance carrier, before the second summons expired. Finally, plaintiff argued that the limitations period had not expired because, pursuant to MCL 700.3801(1) and MCL 700.3803(1)(a), plaintiff had

four months from the date that Devine published a notice notifying estate creditors to present their claims against Davis's estate.

The trial court denied Devine's motion for summary disposition. With respect to plaintiff's service on Davis, the court stated:

[T]he plaintiff did attempt to serve the defendant [Davis] in this case. They [sic] made diligent attempts to serve. They [sic] were never able to serve the defendant, and that's why they [sic] came to this Court to get a substituted service order, which I granted. And they [sic] did comply with that substituted serve order.

It does defy logic that you're able to comply with service on a dead person. But it also defies logic that a plaintiff is not able to file suit or serve a dead person when they're [sic] unaware that someone has died. Now, there is an argument that they [sic] knew in the last month this person had died. But in plenty of other cases, they [sic] might never know that a defendant had died. So, what is the plaintiff to do, if they [sic] are unaware that a defendant has died? So it defies logic that you are able to serve a dead person. So I guess you defy logic in either way. But I think that because the plaintiff satisfied my substituted order of service and complied with it, for all intents and purposes they [sic] accomplished service.

The court also determined that Davis's estate was properly substituted for Davis when the estate was opened. In addition, the court opined that it would have granted a motion for substituted service on Davis's insurance carrier if plaintiff had filed such a motion. The court noted that neither party had argued that Farm Bureau had not been served and opined that service on Farm Bureau was proper.

II. STANDARD OF REVIEW AND PRINCIPLES OF INTERPRETATION

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition pursuant to MCR 2.116(C)(7) is appropriate if a "claim is barred by an applicable statute of limitations." *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). "In reviewing a motion under subrule (C)(7), a court accepts as true the plaintiff's well-pleaded allegations of fact, construing them in the plaintiff's favor." *Id.*

Resolution of the legal issues presented in this case requires the examination of court rules and statutes. "We interpret court rules using the same principles that govern the interpretation of statutes. Our goal when interpreting and applying statutes or court rules is to give effect to the plain meaning of the text. If the text is unambiguous, we apply the language as written without construction or interpretation." *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011) (footnotes omitted). Courts may consult dictionary definitions in order to accord words their common and ordinary meanings. *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012).

III. LEGAL ANALYSIS

“A civil action is commenced by filing a complaint with a court.” MCR 2.101(B). MCR 2.201(C) pertains to the “capacity to sue or be sued.” Pursuant to MCR 2.201(C)(1), “[a] natural person may sue or be sued in his or her own name.” Black’s Law Dictionary (9th ed) defines the term “natural person” as “[a] human being.” *Random House Webster’s College Dictionary* (1997) defines “human being” as “any individual of the genus *Homo*, esp. a member of the species *Homo sapiens*.” Further, definitions of the term “being” include “the fact of existing; existence,” “conscious, mortal existence; life,” “something that exists,” “a living thing,” and “a human being; person.” *Random House Webster’s College Dictionary* (1997). Applying these definitions, pursuant to our court rules a deceased person cannot be sued as a matter of law. MCR 2.201(C)(1). This notion is consistent with MCR 2.202(A)(1), which provides that a motion for substitution of parties must be filed after the death of a party. Under MCR 2.202(A)(1)(b),

[u]nless a motion for substitution is made within 91 days after filing and service of a statement of the fact of the death, the action must be dismissed as to the deceased party, unless the party seeking substitution shows that there would be no prejudice to any other party from allowing later substitution.

Thus, our court rules make clear that a deceased person cannot participate in litigation.

“On the filing of a complaint, the court clerk shall issue a summons to be served” on the defendant. MCR 2.102(A). Pursuant to MCR 2.102(B), the summons “must be directed to the defendant[.]” “A summons expires 91 days after the date the complaint is filed.” MCR 2.102(D). Upon a showing of due diligence in attempting to serve the summons, however, the trial court may issue a second summons for a period not to exceed one year from the date that the complaint was filed. MCR 2.102(D). On the expiration of a summons, “the action is deemed dismissed without prejudice as to a defendant who has not been served with process” MCR 2.102(E)(1).

Plaintiff filed her complaint on May 27, 2011, naming Davis as a defendant. Because plaintiff was unable to serve Davis before the expiration of the first summons, she filed a motion for alternate service and a second summons, which the trial court granted. The court directed plaintiff to serve Davis by regular or certified mail and by publication in the Oakland County Legal News. It is undisputed that plaintiff published notice as directed in the trial court’s order and sent a copy of the complaint and summons to Davis by certified mail, which was returned because Davis was deceased. Unbeknownst to plaintiff, Davis had passed away on December 13, 2010, before plaintiff filed her complaint. Accordingly, Davis was not capable of being sued as a matter of law, MCR 2.201(C)(1), and the trial court erred by concluding that plaintiff properly served Davis with the summons and complaint. In addition, because the second summons expired on October 10, 2011, and Davis was not served before it expired because he was deceased, the action against him should have been “deemed dismissed” without prejudice pursuant to MCR 2.102(E)(1). See *Peterson v Auto-Owners Ins Co*, 274 Mich App 407, 413; 733 NW2d 413 (2007).

Further, the trial court erred by denying Devine’s motion for summary disposition, which required dismissal of plaintiff’s claim *with* prejudice on the basis of the statute of limitations. It is undisputed that the limitations period for automobile negligence actions is three years. See

MCL 600.5805(10). The automobile accident occurred on June 8, 2008, and plaintiff filed her complaint on May 27, 2011, within the three-year period. The filing of plaintiff's complaint alone, however, did not toll the statute of limitations. *Gladych v New Family Homes, Inc*, 468 Mich 594, 598-599; 664 NW2d 705 (2003). In order to toll the limitations period, plaintiff was required to perform one of the actions specified in MCL 600.5856, which provides:

The statutes of limitations or repose are tolled in any of the following circumstances:

(a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.

(b) At the time jurisdiction over the defendant is otherwise acquired.

(c) At the time notice is given in compliance with the applicable notice period under section 2912b [pertaining to medical malpractice actions], if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

If a plaintiff “does not perform any actions specified by § 5856, the statute of limitations is not tolled and therefore the period of limitations continues to run after the complaint has been filed.” *Gladych*, 468 Mich at 599. The only subsection applicable in this case is subsection (a), and, as previously discussed, plaintiff did not serve a copy of the summons and complaint on Davis or his estate within the time set forth in the Michigan Court Rules. Accordingly, the limitations period continued to run and expired before plaintiff served Davis's estate on November 8, 2011.² See *id.* at 607.

Plaintiff erroneously relies on MCL 700.3803(1)(a) of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, in support of her argument that the limitations period did not expire until February 20, 2012. MCL 700.3803(1)(a) provides:

A claim against a decedent's estate that arose before the decedent's death, including a claim of this state or a subdivision of this state, whether due or to become due, absolute or contingent, liquidated or unliquidated, or based on contract, tort, or another legal basis, *if not barred earlier by another statute of limitations* or nonclaim statute, is barred against the estate, the personal

² Incidentally, we note that such service was not proper. The second summons expired on October 10, 2011, before plaintiff sent Devine a copy of the complaint, and named Davis as a defendant rather than Devine, as personal representative of Davis's estate. Our analysis, however, focuses not on the propriety of service, but rather, on whether service was timely.

representative, the decedent's heirs and devisees, and nonprobate transferees of the decedent unless presented within 1 of the following time limits:

(a) If notice is given in compliance with section 3801 or 7608, within 4 months after the date of the publication of notice to creditors, except that a claim barred by a statute at the decedent's domicile before the publication for claims in this state is also barred in this state.

Plaintiff argues that notice was given to interested parties in accordance with subsection (a) on October 20, 2011, and that, accordingly, she had until February 20, 2012, four months thereafter, to file her complaint. Plaintiff's argument is flawed in several respects. First, she ignores the italicized language stating that the four-month period set forth in subsection (a) applies only if a claim is "not barred earlier by another statute of limitations." Second, plaintiff fails to acknowledge that MCL 700.3801 and MCL 700.7608, referenced in subsection (a), pertain to providing notice to "creditors." *Random House Webster's College Dictionary* (1997) defines "creditor" as "a person or firm to whom money is due." Because Davis did not owe plaintiff money at the time of his death, she cannot be properly characterized as a creditor. Third, plaintiff disregards MCL 700.3803(3)(b), which states that MCL 700.3803 "does not affect . . . [a] proceeding to establish the decedent's or the personal representative's liability for which the decedent or the personal representative is protected by liability insurance to the insurance protection limits only." Thus, the plain language of MCL 700.3803 indicates that it is not applicable in this case.

Moreover, plaintiff fails to give effect to MCL 700.3802, which pertains specifically to the statute of limitations for claims made against a deceased person or the person's estate. MCL 700.3802(2) states "[t]he running of a statute of limitations measured from an event other than death or publication for a claim against a decedent is suspended during the 4 months following the decedent's death but resumes after that time as to a claim not barred under this part." Thus, the limitations period for plaintiff's claim against Davis was suspended for four months beginning December 13, 2010, the date of Davis's death. The limitations period recommenced on April 13, 2010, four months thereafter, and expired on October 8, 2011, four months later than it would have expired if Davis had not died. Because plaintiff failed to serve Devine before the limitations period expired, Devine was entitled to summary disposition on plaintiff's claim.

Finally, plaintiff argues that she timely served Farm Bureau, Davis's insurer, and that Michigan law allows a plaintiff to serve an insurer when a tortfeasor cannot be located. Plaintiff relies on *Krueger v Williams*, 410 Mich 144; 300 NW2d 910 (1981) and *Hayden v Gokenbach*, 179 Mich App 594; 446 NW2d 332 (1989), amended 435 Mich 856 (1990). Plaintiff's reliance is misplaced, however, because both cases are factually distinguishable from the instant case. In each case the Court held that service on the defendant's insurer was proper when efforts to locate the defendant involved in the automobile accident were unsuccessful. *Krueger*, 410 Mich at 162-164; *Hayden*, 179 Mich App at 597-599. Thus, in each case the plaintiff was unable to locate the defendant. *Krueger*, 410 Mich at 153; *Hayden*, 179 Mich App at 596. The plaintiff in *Krueger* filed a motion to allow substituted service by serving the defendant's insurer. *Krueger*, 410 Mich at 153. In *Hayden*, the trial court entered an ex parte order for substituted service allowing the plaintiff to serve the defendant's insurer. *Hayden*, 179 Mich App at 596. Unlike *Krueger* and *Hayden*, plaintiff did not file a motion for substituted service allowing her to serve

Farm Bureau, although the trial court indicated that it would have granted such a motion. In addition, also unlike *Krueger* and *Hayden*, Davis's whereabouts were not simply unknown, but rather it was discovered that Davis was deceased before the statute of limitations expired, taking into account the four-month suspension of the running of the statute of limitations set forth in MCL 700.3802. Therefore, plaintiff could have timely filed a complaint against Davis's estate and served the personal representative of the estate before the summons expired. Thus, plaintiff's reliance on *Krueger* and *Hayden* is misplaced.

In summary, the trial court erred by determining that plaintiff properly served Davis with the summons and complaint. Because Davis was deceased, he was not capable of being sued or served with the summons and complaint as a matter of law. Further, because plaintiff failed to serve Devine with a proper summons and complaint before the statute of limitations expired, the trial court erred by denying Devine's motion for summary disposition.

Reversed and remanded for entry of summary disposition in Devine's favor. Devine, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Patrick M. Meter
/s/ Pat M. Donofrio